

# Japan's Soft State of Emergency: Social Pressure Instead of Legal Penalty

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2020-05-13T10:53:03

## Slow and Soft Reaction?

People have been perplexed by the slow and soft approach of the Japanese government in their attempt to bring COVID-19 under control. The first case of COVID-19 in Japan was [confirmed on 16 January 2020](#). On 30 January, the Japanese government set up the COVID-19 Countermeasures Headquarters (which is a different body from the Government Countermeasures Headquarters, based on the New Influenza Special Measures Act 2012). It published emergency countermeasures against COVID-19 on 13 February and presented [Basic Policies for Coronavirus Disease Control](#) on 25 February. However, none of these measures have introduced drastic measures such as border controls and/or curfews.

In the meantime, a quarantine of an international cruise ship began on 4 February at Yokohama Port ([712 people \(appeared as "Other" in the WHO Situation Report\) were confirmed positive](#)). The number of confirmed cases has steadily increased, but not dramatically as in other countries in Europe and North America. When Northern Italian cities started a lockdown on 21 February, there were only [93 cases](#) in Japan. When several states in the U.S. introduced severe restrictions in mid-March, there were about [800 cases](#) in Japan. The Japanese government [repeatedly explained](#) that it was not necessary for Japan to take drastic measures, like a lockdown, until the decision of postponement of the Tokyo Olympic and Paralympic Games was announced on 24 March. The very next day, the Tokyo Governor strongly [asked residents](#) to avoid non-essential outings in order to avoid a surge in infections. She even put pressure on the central government by suggesting [the possibility of a lockdown of Tokyo](#). However, the central government did not declare [a state of emergency](#) until 7 April, when the number of confirmed cases reached [3,906](#). Furthermore, the initial declaration only applied to the seven most affected prefectures including Tokyo. [It was finally widened](#) to cover the whole nation on 16 April when the number reached [8,582](#). However, the declaration is based on the [New Influenza Special Measures Act 2012](#) (NISMA, Act No.31 of May 2012) and does not introduce severe restrictions. Meanwhile there have been calls for a constitutional amendment to include emergency power.

## Emergency Powers in Japan: Past and Present

The previous constitution, [the Constitution of the Empire of Japan](#) (1889-1945), contained several clauses to take emergency measures such as imperial ordinances

(Art. 8); the power to proclaim the law of siege (Art. 14); powers appertaining to the Emperor in times of war or in cases of a national emergency (Art. 31); and financial measures by means of an imperial ordinance (Art. 70). One of the notorious examples was use of the imperial ordinance to amend the Peace Preservation Act 1925 by adding death penalty in order to suppress political dissent.

In contrast, the present constitution, the Constitution of Japan, has no clause on emergencies. In the 1950s-1960s there was a [constitutional dispute](#) on how to interpret the absence of an emergency clause in the constitution. Some argued that the emergency power exists as unwritten law while others claimed that it was a deficiency of law. Due to the previous experience with its (mis)use, some scholars commend the absence of emergency power provisions as a farewell to the past history of wide emergency power. There has been another [debate](#) on whether it is necessary to amend the constitution in order to include an emergency clause. Some views in favour of the amendment argue that it is necessary to have a written clause which can prevent abuse of power in emergency. Others oppose the amendment by claiming that the ordinary law is sufficient to cope with a state of emergency and a written general clause of emergency power can create an opportunity of abusing power. After all, the present constitution has not been amended since its promulgation.

In fact, the absence of an emergency clause in the constitution does not mean that the government cannot cope with an emergency. There are several specific laws to deal with a state of emergency: Art. 71 of [the Police Act 1954](#) (Act No. 162 of 8 June 1954); Art. 105 and Art. 106 of [the Basic Act on Disaster Management 1961](#) (Act No. 223 of 15 November 1961) and Art. 76 and Art. 78 of [the Self-Defense Forces Act 1954](#) (Act No. 165 of 9 June 1954). Furthermore, some laws confer a power to the Cabinet to enact a Cabinet Order to take necessary measures when the Diet is in adjournment or the House of Representatives is in dissolution, and there is no time either to convoke an extraordinary session in the Diet or to convoke an emergency session of the House of Councilors to take action.

The latest example of a state of emergency provided by a specific law is the one in the NISMA which was enacted after several outbreaks of new flus such as Pandemic H1N1 in 2009 to prevent the outbreak and spread of the new influenza and strengthen measures to minimize the impact on people's lives and the national economy. The NISMA allows the Prime Minister as the head of the Government Countermeasures Headquarters for the new influenza to declare a state of emergency by defining its period, area and overview (Art. 32). The period cannot exceed two years and its extension is possible for one year as maximum. The purpose of the NISMA is to strengthen [the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases 1998](#) (Act No. 114 of 2 October 1998) by clarifying the power of the central and local governments. Art. 45 of the NISMA enables prefectural governors to request residents not to leave their home and request a facility manager to restrict usage of facilities (school, social welfare facility, entertainment facility etc.) or stop an event at facilities. However, the NISMA does not foresee any penalty in case of non-compliance.

# Modest Amendment of the New Influenza Special Measures Act 2012

According to [the government's position](#), Japan's emergency measures do not include curfews enforced by penalties and/or fines, nor do they include public transportation shutdowns; they do not constitute a "lockdown".

The only new legislation to cope with COVID-19 is the amendment of the [NISMA](#) (Act No. 4 of 13 March 2020) to include COVID-19 under the category of "new influenza etc" which, other than budgetary measures, needs legislative approval. [The bill](#) was submitted to the Diet on 10 March, passed on 13 March 2020, and came into effect on 14 March. However, it took more than three weeks for the government to announce the declaration based on the NISMA despite the fact that it had set up the Government Countermeasures Headquarters based on the NISMA on 26 March. In [the Prime Minister's speech](#) upon the declaration of a state of emergency, he asked people to refrain from going out in order to achieve a 70 to 80 percent decrease of opportunities for person to person contact, and to follow social distancing policy of avoiding the "3-Cs" (closed spaces, crowded places and close contact with people) for a period of one month.

The prefectural governors can now clarify which facility should be closed under the declaration and request to close. After the declaration of a state of emergency the Tokyo governor consulted with the central government and announced [a list of facilities to be closed](#), and requested for them to do so. However, the request is still [without legal penalty](#). There exists ambiguity and resistance. Some pachinko parlours (pachinko is a Japanese gambling machine) stay open despite the request for their closure. The only action that governors can take is to give instruction for measures and publicize the name of the parlours if they do not follow the instruction. In fact [some parlours which ignored the request and whose names were publicized by the Osaka governor received more customers than usual](#) as other parlours were closed. [Supermarkets](#) which are allowed to open in order to supply daily goods and food have become the popular place for families and couples as there are no other places to go together. [Beaches and mountains](#) became crowded with people. Furthermore, the fundamental problem is that many [office workers](#) cannot work at home because of technical deficiency and work culture although there has been some progress. Therefore, [the goal to decrease direct personal contact by 80 percent](#), which is strongly recommended by the expert group in order to avoid an explosive increase in infections which would burden the medical care beyond capacity, has not been achieved.

In contrast to the unsuccessful situation of social distancing, the only successful closure has been those of schools based on Art. 20 of [the School Health Safety Act 1958](#) (Act No. 56 of 10 April 1958). On 28 February, temporary closure of all elementary schools, junior high schools, and high schools was suddenly announced and they were all closed on 2 March. This created chaos for working parents. Only [38% of schools](#) re-opened for the new academic year which started in April and

more than 80% of universities closed the campus and some of them started online teaching from April.

## **Surfacing Argument for Constitutional Amendment to Include Emergency Power**

Some politicians make use of the present situation as a reason to have a constitutional amendment to include emergency power in the Constitution. In 2012, the present ruling party, the Liberal Democratic Party (LDP), announced a draft of a new constitution which included a clause for emergency power. In 2018, the LDP chose [four items as essential constitutional amendments including emergency power](#). Its draft provides as follows:

“When there is a special circumstance in which there is no time to wait for the legislation to be enacted by the Diet because of a large-scale earthquake or other unusual large-scale disaster, the Cabinet may enact a Cabinet Order in order to protect lives, bodies and property of the people. The Cabinet, when enacting the Cabinet Order set forth in the preceding paragraph, shall promptly request the approval of the Diet as provide for by law.”

Therefore, it is not surprising that during a meeting of the House of Representatives Steering Committee on 7 April, [the Prime Minister](#) emphasized the importance of discussion on a constitutional amendment. He suggested to have a bipartisan discussion at the Commission on the Constitution by responding to a statement of a member of the House of Representatives who emphasized that emergency powers in the constitution were necessary in order to ensure that the state has some degree of force in regulating the lives of the people in the event of an emergency. Prime Minister Abe himself emphasized the need for amending the Constitution on 3 May, [Constitution Day](#).

However, what is seriously and urgently needed at the present situation are effective measures against COVID-19, particularly in response to various real problems such as shortage of PPE and hospital beds, and a surging risk of unemployment and economic recession. Accordingly, [a public poll](#) in April conducted by NHK (a public broadcasting company) discovered that the number of people who think constitutional revision should be a priority has decreased, and 78% of respondents said other issues should come first. [The question is whether those problems cannot be dealt with under the existing law](#). If not, what kind of law is necessary? What the government has done by legislation is just to add COVID-19 to the list of infectious diseases in the NISMA. Therefore, the government should first propose a new law if the present legislation is not sufficient to cope with COVID-19 rather than start a constitutional debate. Then, the constitutionality of such bills needs to be examined. If such bills are unconstitutional but still necessary because of an exceptional circumstance, it is time to consider a constitutional amendment. Some might argue that in an emergency, there is no time to discuss such questions in the legislature. As far as COVID-19 is concerned, the Japanese government had ample time to consider a new law or an amendment. Moreover, causes of a state of emergency

vary. Necessary measures must be different according to each specific situation: war, natural disaster or pandemic.

## Conclusion: Constitutional Test for the Government

As of 11 May, there have been [15,798 confirmed cases and 621 deaths \(218,204 tests conducted\)](#). The increase is now slowing down but it is not certain that the peak has been reached because the number of PCR test is very low ([1.5 tests per 1,000 people](#)). The threat of a second wave of infection will persist. The government [extended a state of emergency](#) (the previous expiry date was 6 May 2020) on 4 May and asked to maintain a “[new lifestyle](#)”. Whether the current “voluntary” social distancing policy (*jishuku*) is working is an interesting question to be asked. In other words, if the consequence achieved by legal restrictions with penalties can be achieved by “voluntary” social distancing, a harsh regime of emergency is not necessary. Moreover, whether a government can enact a law which is in proportion to necessity and does not give unnecessary unfettered power to the government is a good constitutional test for every government in this difficult time. The current pandemic threat is not only a challenge for people’s lives but also a challenge for democracy, rule of law and human rights which provide a system to protect individuals. In this context sharing good practices of every government beyond borders is essential when we have only limited knowledge and experience about COVID-19. Moreover, it is also important to have an independent oversight and scrutiny mechanism at domestic and international levels in order to evaluate the measures taken by the governments for the future challenge.

